

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON DIVISION**

GREGORY MACLEAN, INDIVIDUALLY) Case No. 3:20-cv-03414-GC-JBD
AND IN HIS REPRESENTATIVE)
CAPACITIES, et al.,)
)
Plaintiffs,) Clarkson S. Fisher Building
) & U.S. Courthouse
versus) 402 East State Street
) Trenton, New Jersey 08608
WIPRO LIMITED,)
) October 15, 2024
Defendant.) 11:45 a.m.

TRANSCRIPT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT (DOC 67)
BEFORE HONORABLE J. BRENDAN DAY
UNITED STATES MAGISTRATE JUDGE

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1 TRENTON, NEW JERSEY TUESDAY, OCTOBER 15, 2024 11:45 A.M.

2 (Call to order of the Court)

3 THE COURT: All right. Good morning, everyone.

4 We're here on the record in MacLean versus Wipro Limited,
5 Docket Number 20-3414.

6 May I have the appearances of counsel, starting with
7 the plaintiffs?

8 MR. KOTCHEN: Good morning, Your Honor. Daniel
9 Kotchen and Lindsey Grunert from Kotchen & Low for plaintiffs,
10 and with us is Jonathan Rudnick, as well.

11 THE COURT: Good morning, Counsel.

12 And for defendant?

13 MS. WILLIAMS: Good morning, Your Honor. Greta
14 Williams for Wipro, and I'm joined by my colleagues, Grace Hart
15 and Stephanie Silvano, who's acting as local counsel. Also on
16 the line with us today is Umung Varma, Associate General
17 Counsel at Wipro.

18 THE COURT: All right, good morning to you all.

19 Before the Court is a motion that the plaintiffs have
20 filed to file a second amended complaint. The Court has
21 received and reviewed in depth briefs by the plaintiff, both
22 the moving brief and a reply brief, as well as the defendant's
23 opposition.

24 Mr. Kotchen, let me hear from you. You can assume my
25 familiarity, both with the case and the arguments, but I did

1 want to hear oral argument from counsel.

2 MR. KOTCHEN: Yes, Your Honor. Look, I think the
3 motion to amend is pretty -- is a simple argument for us.
4 There -- the -- under the schedule, the deadline to -- for
5 leave to amend, just under the schedule as to amend was October
6 13th of 2023. After that date, two things happened. One was
7 the *Rajaram* case from the Ninth Circuit was issued in June of
8 2024. That is the first and very well done decision by a court
9 of appeals that held that citizenship discrimination is
10 actionable under 1981. That is one event that occurred post
11 the October 2023 date in the schedule.

12 The second is in November -- in late November, Wipro
13 produced a rotation policy. And it had iterations -- the
14 policy itself reflected -- it had iterations going back to the
15 2012 or so time frame of a rotation policy that we think is a
16 facially neutral policy that would -- that would satisfy the
17 Court's disparate impact standards to address -- pursue a
18 disparate impact theory under Title VII.

19 And so what we're doing is we are seeking to amend
20 the complaint for the simple proposition of adding a
21 citizenship discrimination claim, and to allege a disparate
22 impact claim under Title VII. So we would still have a 1981
23 claim. We would still have a Title VII claim. We would just
24 add citizenship discrimination and disparate impact to those
25 claims.

1 As a practical matter, the addition of those
2 allegations would have no effect on discovery -- on the scope
3 of discovery. The discovery -- discovery, as Your Honor knows,
4 is -- we're still in the process of pursuing custodial
5 discovery, ESI, and so forth. And the scope of what we would
6 be seeking would not be enlarged at all by the addition of our
7 amendments.

8 The rotation policy was produced as a matter of
9 discovery in this case. It's clearly part of this case.
10 Iterations -- Wipro has committed to producing to us all
11 iterations of the rotation policy going back in time.

12 And the citizenship discrimination claim, as well,
13 because -- one of the mechanisms by which Wipro achieves what
14 we think of as a discriminatory preference in this case is
15 utilizing visa employees from India, the race and national
16 origin allegations overlap a lot with the citizenship
17 allegations such that there's no enlargement of discovery. So
18 we think that -- that under the cases that we cite, that
19 there's good cause to adjust the schedule to allow this -- to
20 allow the amendments post the deadline in the existing
21 schedule.

22 And if you look at the *Taylor*, *Jani*, *McGrath* cases
23 that we cited, when there are developments in discovery that
24 occur in a case, leave is freely granted to allow amendments to
25 an existing complaint to comport with that discovery. And we

1 think that -- so we think there's good cause to adjust the
2 schedule.

3 We think under the Rule 15 factors, that we meet each
4 and every one of the Rule 15 factors. There's no undue delay
5 here. You have the Ninth Circuit decision that was issued in
6 June of 2024. The rotation policy, we reviewed and understood
7 that policy in February of 2024 as we were briefing discovery
8 issues with the Court. And there -- so we promptly -- there
9 was a four-month or so gap between when we reviewed it,
10 understood it, and sought for leave to amend. We think in this
11 case, that would not constitute any sort of undue delay.

12 There's no bad faith here. This isn't something that
13 -- where we are trying to cover up for some shortcoming in the
14 case. These are factors that -- these are issues that we
15 learned about in discovery, and we're acting on it as part of
16 our obligations to our clients.

17 There's no repeated failures to use this information
18 to amend the complaint and we haven't been successful. We
19 don't -- there's nothing like that in the record here.

20 There's not undue prejudice to Wipro. I mean, these
21 -- Wipro, for example, produced the rotation policy. That
22 policy is part and parcel of the case as it stands in its
23 existing state.

24 The Ninth Circuit decision is consistent with a lot
25 of the facts and circumstances that we have in this case, and

1 it simply allows another legal claim to be brought under the
2 1981 framework. We don't think that it expands discovery at
3 all. And certainly, there could be no argument that there's
4 undue prejudice here.

5 And we don't think that there's anything that's
6 futile about our amendments. The rotation policy is a facially
7 neutral policy that satisfies the Court's decision on the
8 motion to dismiss to advance a facially neutral policy to
9 pursue a disparate impact claim. And we think the *Rajaram* case
10 from the Ninth Circuit is well-reasoned. It's the -- it's the
11 very first -- the very first court of appeals decision to
12 address this issue, and we think that it should be followed by
13 the Court. And it's certainly -- it's certainly a more
14 persuasive, and well-reasoned, and thorough decision than the
15 prior decision from the Fifth Circuit in the 1970s, the
16 *Chaiffetz* decision.

17 So for those reasons, Your Honor, we think that
18 moving to amend -- amendment, as we proposed, is appropriate.
19 And we would be happy to address any questions that you may
20 have (indiscernible - multiple speakers).

21 THE COURT: Yeah, I do. Thank you, Mr. Kotchen. I
22 have a few questions. Of course, you know, you mentioned that
23 the plaintiffs haven't, you know, brought this amendment in bad
24 faith. Of course, under Rule 16, you face a higher standard.

25 With respect to the global rotation policy, perhaps

1 you could comment on how you were diligent in finding and
2 locating the policy on which your motion to amend is now based,
3 at least with respect to disparate impact.

4 MR. KOTCHEN: Well, that -- that rotation policy was
5 produced on November 21st of 2023. And so this is not -- this
6 is not something that sat in -- in our -- in our system for,
7 you know, a significant period of time. We were reviewing
8 documents. We identified the rotation policy. We identified
9 it in a brief -- in a document re -- leading up to a joint
10 letter brief to the Court at the beginning -- beginning of
11 March, so in the February or so time frame.

12 And, you know, as a -- I think that there -- there
13 could be -- if you look at the *Taylor*, the *Jani*, and the
14 *McGrath* cases, the amount of time that can pass -- I mean, the
15 *Jani* case, for example, seven months had passed before
16 something was brought to the Court's attention in the form of a
17 motion to amend.

18 Here, we had several months from when we identified
19 it, and then we moved to amend. We -- I -- we approached
20 Wipro, I think, July 12th after, you know, reviewing documents
21 in the February, late February time frame of 2024. As -- you
22 know, we're (indiscernible - multiple speakers) --

23 THE COURT: So, I mean, would you agree -- I mean,
24 essentially your position reduces to between November -- what
25 was it, the 21st, did you say?

1 MR. KOTCHEN: It was produced on November 21st, yes.

2 THE COURT: And July 26th. So, eight months is not
3 unreasonable. Is that -- I mean, is that your position?

4 MR. KOTCHEN: I mean, we don't think that's
5 unreasonable, correct.

6 THE COURT: All right. With respect to citizenship
7 discrimination, help me understand why the Ninth Circuit's
8 decision was sort of this, you know, sea change that now
9 supports amendment when, to my understanding, there was no
10 controlling, binding, or even perhaps persuasive case law on
11 the issue in the Third Circuit, either way.

12 MR. KOTCHEN: There hadn't been a court of appeals
13 decision that squarely addressed this issue. I know there was
14 the *Chaiffetz* decision from the Fifth Circuit, but that was a
15 decision where the counsel -- the plaintiff's counsel all but
16 admitted that citizenship discrimination would not be
17 actionable under 1981. And so -- and that was -- it dealt with
18 the issue in just a -- in a single paragraph. The sole issue
19 before the Ninth Circuit was can citizenship discrimination be
20 appropriate?

21 THE COURT: Yeah, I mean, which way does that cut
22 though, Mr. Kotchen? I mean, your view is that the decision
23 out of the Fifth Circuit was so poorly reasoned and so, you
24 know, sort of -- I mean, I think the decision refers to
25 alienage, right? Not citizenship.

1 MR. KOTCHEN: Correct.

2 THE COURT: Right? And so, you know, on the merits,
3 it seems like there would be no logical reason not for you to
4 bring a citizenship discrimination claim in this case in the
5 first instance.

6 MR. KOTCHEN: Your Honor, the -- we had alleged it.
7 And I will tell you, we've alleged it in other cases, and we
8 have lost based on the existing case law.

9 And so it was -- you know, no one wants to -- if
10 we're going to allege something and we're going to pursue
11 something, we're going to do it with a firm basis that we're
12 going to prevail on it. And so I think that the Ninth Circuit
13 -- there has been -- if you look at the district courts, for
14 example, in the Ninth Circuit, there are cases that go both
15 ways on that. We pursued a case, a citizenship discrimination
16 case in the Ninth Circuit -- in a district court in the Ninth
17 Circuit, in the Northern District of California, and lost. We
18 pursued it in the Southern District of New York; we lost. We
19 think when -- when -- when judges --

20 THE COURT: But you pursued it -- you pursued it is -
21 - is the sort of fundamental point. Whether you lost or not,
22 right, you asserted it, correct?

23 MR. KOTCHEN: We asserted it. But I -- I think -- I
24 mean, I would respectfully push back on that and say, the
25 fundamental point is we lost it. We're not interested in

1 pursuing something that we're going to lose.

2 And so when you look at the language of the Ninth
3 Circuit decision, how it construed the statute, we can think --
4 we can think of no better basis to pursue it in this case in a
5 way that -- that -- you know, if -- if Your Honor, or Judge
6 Castner, or whoever is looking at it, and looking at the
7 language of the statute, coupled with the Ninth Circuit
8 decision, we think it gives a firm basis to say, "Yup, this is
9 an appropriate action under 1981."

10 Could we have -- could we have alleged it in the
11 first instance? We certainly could have. Our track record on
12 this has been, we were batting zero percent. Literally zero.
13 And so we could have alleged a lot of other things that I think
14 we would have lost on, as well. But once we get the Ninth
15 Circuit decision, we think it's an appropriate -- it's an
16 appropriate reason and basis, and if you look at the *Abraxis*
17 case, appropriate basis to -- to reassert or to assert a
18 citizenship discrimination claim here.

19 Well, Your Honor, you're right that we certainly
20 could have alleged it in the first instance. We just -- we
21 just hadn't had success in that.

22 THE COURT: Okay. Next -- thank you, Mr. Kotchen.
23 Next question, can you -- I'm looking at proposed new
24 Paragraphs 24 and 25 in the proposed second amended complaint.
25 You know, Judge Wolfson, in her opinion, on my read, you know,

1 she clearly, you know, dismissed the disparate impact claim for
2 failure to identify a facially neutral policy. But it seems to
3 me that her decision went -- also went a little bit deeper than
4 that and said, look, this entire case really sounds in
5 discriminatory treatment, disparate treatment.

6 And I guess, you know, if I understand Wipro's
7 argument, is notwithstanding the allegations in the complaint -
8 - in the new proposed complaint -- that this policy is facially
9 neutral, generally applicable, what's really going on here is
10 Wipro treating your clients, and clients like your clients,
11 putative class members, different based on their national
12 origin and the like. And perhaps you could just help me
13 understand why this policy, as alleged, truly is neutrally --
14 you know, generally applicable neutral policy as opposed to
15 something that's applied in a discriminatory way.

16 MR. KOTCHEN: So under the policy, you have -- once
17 you -- once you have -- you have two things going on. One is
18 it's a policy that applies for offshore resources to be rotated
19 into roles. So there's a prior -- they're prioritized for
20 roles in the U.S.

21 It's also a policy by which individuals are rotated
22 out of roles. So, for example, if you hit a three-year time
23 frame. And so nothing about that says anything about race,
24 national origin, and the like. Nothing about it.

25 But if you have a scenario where one individual is

1 rotated out of a role and another individual is rotated into
2 the role, and the individual who's rotated out of the role is
3 put in non-productive status, it's referred to as being
4 benched, benched and then fired, if you look at the data, it's
5 going to have a disparate impact, we believe, on one group of
6 folks over others. Even though the rotation policy itself says
7 nothing about what the characteristics, either race, or
8 national origin, or what have you, the characteristics are
9 about the individuals who, for example, are rotated out of the
10 roles. But that is -- that's where the disparate impact
11 happens.

12 And it's something that -- it's -- you know, there's
13 nothing about -- when you look at the terms of the policy, the
14 language of the policy, there's nothing about it that has
15 anything to do with what type of person it's going to affect.
16 But when you look at the data, we think it's going to affect
17 one type of person over others. And that is squarely, we
18 think, within the disparate impact realm of what constitutes a
19 facially neutral policy that disparately impacts one group of
20 folks over the others.

21 THE COURT: All right. Thank you, Mr. Kotchen. Last
22 question.

23 MR. KOTCHEN: Sure.

24 THE COURT: With respect to what impact this has on
25 the case, I heard you to say, and I read your papers to say it

1 has no impact because there's near overlap or complete overlap
2 with the existing claims in the case. And I just want to make
3 sure that I hear you correctly.

4 So for instance, if the Court permitted the
5 amendment, there will be no additional requests for production.
6 There will be no additional interrogatories. Nothing is
7 changing. Is that your view?

8 MR. KOTCHEN: Your Honor, the amendment will not lead
9 to any additional discovery requests from our -- from our side
10 at all. They are -- the amendments would be captured by what's
11 already been issued. If there is a future discovery request on
12 something, it will be because of some other issue, not because
13 of these amendments at all. So, we -- we think it would have
14 no effect on the scope of discovery.

15 THE COURT: All right. And then related to that,
16 does expert discovery -- the expert discovery landscape change
17 at all, you know, for example, the need for statistical
18 analyses? I understood you to be undertaking those already,
19 albeit in the context of disparate treatment. But does the
20 expert discovery landscape look any different if that claim is
21 permitted?

22 MR. KOTCHEN: Not that -- no, Your Honor, it wouldn't
23 look any different.

24 THE COURT: All right. Thank you, Mr. Kotchen. I'll
25 give you a brief time to respond once I hear from Ms. Hart.

1 MR. KOTCHEN: Okay.

2 MS. HART: Okay, thank you, Your Honor.

3 So plaintiffs, now years into this litigation, have
4 made a belated request to reopen the pleadings and add two new
5 claims. And that motion should be denied for two primary
6 reasons.

7 First, the plaintiffs cannot show good cause for an
8 untimely amendment to add two new claims at this stage of the
9 case, as required by Rule 16. Now that alone requires the
10 denial of plaintiffs' motion. The Court does not need to even
11 reach the Rule 15 factors to resolve this motion in Wipro's
12 favor.

13 But even if the Court does reach the Rule 15
14 analysis, all three of the relevant factors, undue delay,
15 prejudice, and futility, all support denial of leave to amend.

16 I'll start with the Rule 16 analysis. The plaintiffs
17 fall far short of meeting their burden of demonstrating good
18 cause for a late amendment, nearly a year after the deadline to
19 file amended pleadings. The good cause standard under Rule 16,
20 as Your Honor alluded to earlier, focuses on the diligence of
21 the moving party. And the record here is really crystal clear
22 that the plaintiffs have been far from diligent.

23 The plaintiffs have been aware of the purported basis
24 for the two new claims they seek to add to this case for
25 months, if not years, before filing their motion for leave to

1 amend. This substantial delay is really the opposite of
2 diligence and forecloses any showing of good cause.

3 So starting with the citizenship discrimination
4 claim, you know, the proposed claim is premised on the legal
5 theory that Section 1981 prohibits discrimination against U.S.
6 citizens. And, you know, as you just heard counsel discuss,
7 you know, plaintiffs' counsel has been aware of this legal
8 theory and has been pursuing it in other courts for the past
9 five years.

10 In other words, this is not a novel legal theory that
11 was only recently recognized for the first time. Nothing
12 prevented the plaintiffs' counsel from asserting the exact same
13 type of claim in this case that they have been pursuing in
14 other courts for years. Plaintiffs' counsel simply made the
15 strategic decision not to assert that type of claim in this
16 case. We just heard counsel kind of go through a lengthy
17 explanation of why they didn't want to file this type of
18 citizenship discrimination claim at the beginning of the case.
19 They didn't like how the precedent had shaken out for them in
20 different courts. They seem to have the view that they were
21 entitled to wait to seek leave to amend to assert a citizenship
22 discrimination claim until they were satisfied with the, you
23 know, precedent supporting that type of claim. That really
24 isn't the standard, and the plaintiffs don't cite any case law,
25 you know, recognizing that as the standard for good cause for a

1 late amendment.

2 The plaintiffs, you know, also emphasize that the
3 *Rajaram* case out of the Ninth Circuit was the first circuit
4 court decision to recognize a citizenship discrimination claim
5 under Section 1981. And while that is true, that does not
6 provide good cause for a late amendment because, you know, as
7 we demonstrated in our papers, and as plaintiffs' counsel just
8 discussed, that -- you know, the absence of circuit court
9 authority for this type of claim was not a bar for them to file
10 the exact same claim in courts across the country. So there
11 was nothing that prevented them from doing so here and
12 asserting that claim, you know, at the beginning of this
13 litigation, or really at any point before the October, 2023
14 amended pleading deadline.

15 THE COURT: You would agree though, Ms. Hart, that
16 that gave the plaintiff, you know, additional ammunition,
17 right? I mean, it's -- it's wind at its back once the Ninth
18 Circuit comes out, no?

19 MS. HART: I mean, it's certainly another, you know,
20 non-binding persuasive decision recognizing this type of
21 citizenship discrimination claim. But, you know, as we laid
22 out in our papers, that type of persuasive authority existed
23 before the amended pleading deadline. You know, we cited as
24 one example a District of Oregon case from 2021, you know,
25 adding another persuasive non-binding decision, you know, after

1 the amended pleading deadline does not constitute good cause.
2 And, you know, plaintiffs do not cite any cases, you know,
3 supporting that view of the good cause standard, and we are not
4 aware of any either.

5 So for those reasons, we think there is not good
6 cause for the plaintiffs to, you know, file a late amendment to
7 assert a citizenship discrimination claim.

8 Turning next to the disparate impact claim, you know,
9 we think the lack of good cause and the lack of diligence here
10 is even more clear. You know, as counsel explained, Wipro
11 produced the global rotation policy on November 21st, 2023,
12 which was just a few weeks after the amended pleading deadline.
13 But the plaintiffs did not file their motion for leave to amend
14 until eight months later, in late July of 2024.

15 And one fact that plaintiffs' counsel did not mention
16 in their argument, but I think is worth highlighting for the
17 Court is, you know, the production that we made on November
18 21st, 2023 that contained the global rotation policy included
19 only 18 documents that totaled 177 pages. You know,
20 plaintiffs' counsel just told you that they did not discover
21 the policy in that production until February. So it appears
22 that they did not review our production for three months.

23 But even after they discovered the policy in February
24 of 2024, they sat on it for five months before filing a motion
25 for leave to amend, which, you know, is really the opposite of

1 diligence. And kind of looking at the total course of conduct
2 here, the fact that the plaintiffs had this policy in their
3 possession for eight months before they filed a motion for
4 leave to amend is really a textbook lack of diligence that
5 forecloses a showing of good cause. And it's important to note
6 that courts in this District have found there's no good cause
7 for an untimely amendment based on even shorter delays.

8 For example, the *Fermin* case that we cited in our
9 papers, the Court found there was not good cause for a late
10 amendment where the plaintiff waited six months to seek leave
11 to amend after obtaining the relevant evidence that formed the
12 basis of their proposed amendment.

13 So, you know, we think the lack of diligence is
14 clear. We haven't, you know, heard from plaintiffs' counsel in
15 their motion, in their reply brief, or in their argument today
16 really why it took them so many months, nearly a year to file
17 their motion for leave to amend after we produced the policy.

18 So, you know, for these reasons, we think the
19 plaintiffs have not met their burden of showing good cause
20 under Rule 16 for either of their proposed amendments. And
21 that alone requires the denial of their motion. So the Court
22 does not even need to consider the Rule 15 factors to deny the
23 plaintiffs' motion for leave to amend. But if the Court
24 reaches those factors, again, all three support the denial of
25 plaintiffs' motion.

1 You know, the first factor undue delay, I'm not going
2 to go into because I think that overlaps a lot with the
3 material that I just covered in terms of the good cause
4 standard.

5 On prejudice, you know, just to respond briefly on
6 the point that plaintiffs' counsel made. You know, I think
7 that, kind of, if we take a step back and look at where we are
8 in the case, you know, we're more than four years into this
9 litigation. Wipro answered the complaint nearly two years ago.
10 We've been engaged in discovery for more than a year. Parties
11 have collectively served hundreds of discovery requests, you
12 know, exchanged dozens of pages in meet and confer
13 correspondence. We've had multiple lengthy discovery
14 conferences before Your Honor. You know, we're --

15 THE COURT: Today being one of them.

16 MS. HART: Yes, exactly, today being one of them.

17 (Laughter)

18 MS. HART: You know, we're pretty far along. Wipro -
19 - we've produced more than 60,000 documents in this case. You
20 know, to, at this stage of the proceedings, essentially reopen
21 the pleadings and put into flux, you know, the scope of the
22 case and what the claims actually are is just going to delay
23 the case even further and push off, you know, the point at
24 which the case can ultimately be resolved.

25 THE COURT: Help me understand that, though. Because

1 Mr. Kotchen has committed, both in his papers and here today,
2 that there's going to be no additional discovery requests. I
3 mean, it is, with that commitment, sort of difficult to
4 envision there being any delay because of the amendment, if the
5 Court permits it. You know, delays in these cases are what
6 they are. I mean, the age of the case is sort of, you know,
7 doesn't -- the case was stayed for a significant period of
8 time. So four years isn't really four years in which this case
9 was being actively litigated.

10 I share everybody's concern about moving this case
11 forward expeditiously. I'm just having a hard time thinking
12 about how this -- how the amendment actually truly will cause
13 further delay.

14 MS. HART: Sure, Your Honor, I'm happy to address
15 that, and I have two responses.

16 First is, you know, in terms of setting a schedule
17 for the case, if the amendment is allowed, Wipro intends to
18 file a motion to dismiss. And, you know, we expect it will
19 likely take months, potentially longer, for the parties to
20 brief and the Court to decide a motion to dismiss.

21 So we have a hard time seeing how the parties could
22 complete discovery, and how the Court could set a meaningful
23 schedule for discovery and dispositive motions if the scope of
24 the claims in the case are in flux and we don't even know when
25 we will have certainty on which claims are in the case and

1 which claims are not.

2 But to talk about discovery specifically, my second
3 point. You know, I heard plaintiffs' counsel commit to not
4 serving additional RFPs and interrogatories if the amendment is
5 allowed, but I don't think that, you know, provides certainty
6 that the scope of discovery won't be expanded. I mean, we are
7 currently in the process of negotiating custodians. There
8 currently are two essentially identical disparate treatment
9 claims in the case. And as my colleague, you know, explained
10 earlier, the plaintiffs had provided a proposed custodian list
11 that has almost a hundred people. You know, if disparate
12 impact and citizenship discrimination are added to the case, it
13 could impact the scope of the custodians, which, you know,
14 we're already talking about very large numbers of custodians.
15 It could impact the depositions that are taken in this case,
16 you know, expert discovery, data production in response to the,
17 you know, RFPs that have already been served. You know, and
18 that is to not even say anything about Wipro's defenses to
19 those claims.

20 You know, regardless of whether the plaintiffs intend
21 to serve additional requests to seek evidence to support their
22 claims, you know, Wipro is certainly entitled to seek discovery
23 to support their defenses to the claims. And, you know, given
24 the differences between disparate treatment claims and
25 disparate impact claims, I don't expect our defenses, if the

1 amendment is allowed, to be a total one-to-one.

2 So, you know, I think it's really far from the clear
3 picture that Mr. Kotchen painted that, you know, the scope of
4 discovery won't be impacted at all if these amendments are
5 allowed.

6 So, I'll just conclude by briefly addressing
7 futility, which Your Honor touched on. You know, the
8 citizenship discrimination claim we address in our papers, and
9 unless Your Honor has questions on that, I'm happy to let that
10 rest on the papers.

11 In terms of the disparate impact claim, you know, Mr.
12 Kotchen raised at the beginning of his argument, and also in
13 his papers, you know, we had argued in our -- in our opposition
14 brief that the plaintiffs lack standing to assert their
15 disparate impact claim because the global rotation policy
16 underlying their proposed claim was issued in July, 2023, which
17 is years after all of the named plaintiffs left the company.

18 You know, Mr. Kotchen's argued that because, you
19 know, there's a version history in the policy that lists
20 different versions going back to 2012, you know, his clients,
21 therefore, you know, must have been subject to this policy and,
22 therefore, must have been injured by it and, therefore, have
23 standing. You know, that certainly is not stated on the face
24 of the policy. That, you know, it has been in effect in the
25 same form for the past 12 years. That's not alleged in the

1 complaint and, you know, counsel's assumptions about, you know,
2 what policies may have been in effect in the past is certainly
3 not enough to establish that the plaintiffs have been injured
4 by such a policy and to establish standing.

5 So, you know, in addition to the reasons explained in
6 our papers, which, you know, concerning the failure to allege a
7 facially neutral employment policy, you know, we also think
8 there's lack of standing to assert a disparate impact claim.

9 So, in addition to all of the other reasons I
10 explained, the proposed amendment would be futile, as well.
11 So, for all of those reasons, we ask that the motion to amend
12 be denied.

13 THE COURT: Thank you, Ms. Hart.

14 Mr. Kotchen, briefly.

15 MR. KOTCHEN: Your Honor, look, I'll -- I'll largely
16 rest. I think that when you look at the *Abraxis* case, when you
17 look at the *Jani* case, when you look at the *Taylor* case, when
18 you look at the *Norfolk* case, there's -- nothing about this
19 would constitute undue delay in terms of our moving for
20 amendments.

21 We obviously disagree with Ms. Hart's recitation --
22 her arguments about the futility, about undue delay, about, you
23 know, our, you know, we could have advanced a claim that we
24 didn't feel strong about in the first instance before the Ninth
25 Circuit decision, but I think it'd be redundant with the

1 arguments I had made to you previously.

2 So, I think we'll largely rest, and I'm confident
3 that you've -- you understood the issues, in addition to the
4 briefing.

5 THE COURT: All right. Thank you very much, Counsel.

6 I'm not going to rule today. I'm going to reserve,
7 and I will issue a written opinion in fairly short order. But
8 thank you, Ms. Hart and Mr. Kotchen, for your arguments today
9 and the briefing, as well.

10 We can go off the record, Chris.

11 (Whereupon, at 12:17 p.m., the hearing was adjourned.)

12

13 CERTIFICATE OF TRANSCRIBER

14

15 I, KAREN HARTMANN, a certified Electronic Court
16 Transcriber, certify that the foregoing is a correct transcript
17 from the electronic sound recording of the proceedings in the
18 above-entitled matter.

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22 Karen Hartmann, AAERT CET 475 Date: November 17, 2024

23 TRANSCRIPTS PLUS, INC.

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